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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 553

JOSEPHINE KUS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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In this reply brief we shall not restate the arguments already set forth in our petition but shall deal only with the specific matters in respondent's brief which seem in most urgent need of correction.

Respondent's brief in opposition seeks to distract attention from consideration of the petition on the merits by invoking the "harmless error" and the "two-court" doctrine. Since the court of appeals did not make its own independent appraisal of the evidence, as we shall show in this reply, but limited its review of the evidence to considering whether the general findings were clearly

erroneous and did not review the errors of law, then the failure of the trial court to make specific findings[1] was not harmless error, and petitioner was denied a two-court review of the factual issues. Therefore we filed the petition for rehearing below.

The basis of respondent's argument, as expressed at pages 9 and 10 of the brief in opposition is:

> "Even if the findings were subject to criticism such defects as there may have been were cured by the appellate court's independent determination, made upon all of the evidence."
>
> "Whatever the technical deficiencies (if any) of the findings here, they plainly did not interfere with the proper resolution of this controversy. Notwithstanding petitioner's contentions to the contrary (Pet. 14-16), this case does not involve any complex questions of Illinois law, but turns upon simple factual issues * * * the opinion of the court of appeals (Pet. 25-29) demonstrates that the appellate tribunal made its own careful appraisal of the record and reached its own determination that the record as a whole supported the district court's denial of recovery on these grounds."

The first error is the assertion that the opinion indicates an independent appraisal of the record by the court of appeals. Respondent studiedly avoids any actual quotation from that opinion since it contains the following three statements, contrary to respondent's contention:

> "This court may not set aside findings of fact of a trial court unless such findings are clearly erroneous (Pet. 25-26).

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1. The trial court failed to make any of these crucial findings: (1) to state what fact was the basis of its conclusion of "legal accident"; (2) to decide whether Sam Wallace backed out of the elevator across the corridor with his head turned in the opposite direction, and (3) to point out wherein Josephine Kus departed from the standard of ordinary care. Lacking them, the court of appeals erred in applying the "clearly erroneous" standard to the findings made.

> "On all of the contradictory testimony found in this record we cannot say that the findings of the trial court were clearly erroneous" (Pet. 29).

In the last sentence of the opinion, the court of appeals again repeats its holding, not that the evidence was such that, from its independent review of the record, it concluded that the trial court's decision was correct, but that "We cannot say that the findings of the trial court were *clearly erroneous*" (emphasis supplied) (Pet. 29).

Manifestly, the court of appeals felt itself bound by the clearly erroneous rule [Rule 52a], and nowhere in the opinion does it express, or even intimate, what view it might take of the evidence if this rule were inoperative. In a situation such as this where respondent assumes, or tacitly admits, that the findings were insufficient, petitioner was entitled either to sufficient findings before a decision on the merits or to an independent examination of the record by the court of appeals. This also is tacitly admitted by respondent.

Respondent states, at page 9 of its brief:

> "* * * courts of appeals are not required to remand a case to the trial court where the findings are insufficient, but may, by their own examination of the record, determine whether sufficient factual basis exists for the lower court's holding."

In support of this proposition, respondent cites *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. (2d) 4 (C. A. 7th, 1950). However, respondent omits to state that, at page 6 of that opinion, the court of appeals based its conclusion upon its own examination of the record. This is in accord with the principle generally followed by the courts of appeals that, although a failure to make sufficiently "detailed" findings under Rule 52(a) is erroneous, it is not reversible where the record is clear and the court of appeals, *on its own examination of it*, can conclude that

the decision was correct.[2] Perhaps the most closely analogous situation is the decision in *Desch* v. *United States*, 186 F. (2d) 263 (C. A. 7th, 1951) where the court of appeals held that the findings in a negligence case were inadequate, reviewed the testimony, and reversed findings of negligence and contributory negligence, adverse to the plaintiff, without reference to the clearly erroneous rule, remanding the cause only for the determination of damages. In so doing the court said, at page 625:

> "The trial court should make such subsidiary findings of fact as will support the ultimate conclusion reached by the court. *Dearborn Nat. Casualty Co.* v. *Consumers Petroleum Co.*, 7 Cir., 164 F. 2d 332. Findings should be sufficient to indicate the factual basis for the conclusions of the court. *Kelly, et al.* v. *Everglades Drainage District*, 319 U. S. 415, 420, 63 S. Ct. 1141, 87 L. Ed. 1485. *In as much as such factual findings are missing, we have carefully read all of the evidence in this record. We are convinced that the court's determination that the driver of the truck was not negligent is not sustained.*" (Emphasis ours.)

No such language appears in the opinion in this case. Instead, as noted previously, the court of appeals repeatedly states that the basis of its decision is the "clearly erroneous" rule. Thus, either petitioner was deprived of her right to have adequate findings of fact in the record prior to decision on the merits by the court of appeals or of her right to an independent review of the facts by that court.

The second error in the argument of respondent is the assumption that no question of Illinois law is involved.

2. See: *Woodruff* v. *Heiser*, 150 F. (2d) 873 (C. A. 10th, 1945); *Burman* v. *Lenkin Const. Co.*, 149 F. (2d) 827, 828 (C. A. D. C., 1945); *Herwitz* v. *Herwitz*, 136 F. (2d) 796, 799 (C. A. D. C., 1943); *Hazeltine Corporation* v. *General Motors Corporation*, 131 F. (2d) 34, 37 (C. A. 3rd, 1942); *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F. (2d) 1, 3 (C. A. 4th, 1942), and *Girard Trust Co.* v. *Amsterdam*, 128 F. (2d) 376, 377 (C. A. 5th, 1942).

ling itself limited by the clearly erroneous rule, the rt of appeals failed to take any cognizance of the trial rt's finding that this occurrence was an "accident" mpare Pet. 23-4 with the statement of the issues by court of appeals at Pet. 25).[3] Actually, under the ois authorities cited at page 15 of the Petition, such nding is inconsistent with a finding that the plaintiff contributorily negligent. Likewise, the Court of Ap- ls ignored the questions of law tendered to it with re- et to "forseeability," "negligence" and "contributory ligence" (Pet. 15-17). Its only announced basis for was the "clearly erroneous" rule; yet, in most cir- s, this rule does not prevent the review of findings of for errors of law (Pet. 13), and both negligence and tributory negligence are mixed questions of fact and *Matsumoto* v. *Chicago & N. W. Ry. Co.*, 168 F. (2d) 499 (C. A. 7th, 1948).

his error with respect to the scope of review under e 52(a) was the basis of petitioner's third "Reason Granting the Writ" (Pet. 13-17). Significantly, re- ndent completely ignores this reason, and attempts, out demonstration, to gloss over these issues of law by ing that, "this case does not involve any complex ques- s of Illinois law." Being without support in the Illi- authorities, this assertion of respondent can be ex- ned only in terms of practical necessity. To have d this issue squarely would have been to admit that

[3] Respondent's argument (R. Br. 7) that findings are suffi- if, when read in conjunction with the court's opinion, they the court of appeals a clear understanding of the basis of decision, is irrelevant. A comparison of the trial court's ion and the findings indicates that they are substantially tical (Pet. 21-23), and a comparison of both with the opinion w conclusively demonstrates that the court of appeals com- ly ignored the role of the findings concerning "accident" "forseeability", in the trial court's decision.

the court of appeals had misconceived the scope of review under Rule 52(a).

Respondent attempts to minimize the question of the sufficiency of the findings under Rule 52(a) as not being one of general importance in Federal practice (R. Br. 6). The very number of authorities cited by both the respondent and the petitioner indicates the frequency with which this question has arisen and the difficulties that it presents. Moreover, none of the cases which reached this court is a negligence case, and, as respondent states, the degree of exactness required depends upons the circumstances of the particular case.[4] The fact that in "the exceedingly simple factual background of the case" at bar, the trial court made findings which did not reach the real controversy between the parties as to the facts; and the court of appeals held that, "This court may not set aside findings of fact of a trial court unless such findings are clearly erroneous," and the petitioner in this court is confronted with the "harmless error" argument, demonstrates a need for a new examination of the requirements of Rule 52(a) as they apply to trial and appellate practice.

Respondent seeks to narrow the basis of petitioner's application for a writ of certiorari to the failure of the trial court to comply with Rule 52(a) in its findings of fact (R. Br. 5). In so doing, respondent ignores the second, third and fourth questions presented (Pet. 3, 4).

Petitioner urges that she was denied review of questions not subject to the clearly erroneous limitation. When the

4. There may be some who would state that the issues in every negligence case are the same. This is a fallacy because, while the ultimate or legal issues are the same, one negligence case differs from all others in the factual disputes that exist between the parties. From the need to pin-point the factual disputes between the parties has arisen the modern pretrial conference procedure. Because of these factual disputes, findings of fact in terms of the ultimate issues in a negligence case serve little purpose.

clearly erroneous doctrine, as a restriction on the court of review, is applied to all findings, without regard to whether they are specific findings of the factual controversy or legal conclusions from facts which are not found, then the requirements of Rule 52(a) become important, because findings which do not meet these requirements should be subject to unrestricted review in the court of appeals, *Galena Oaks Corporation* v. *Scofield,* 218 F. (2d) 217, 219 (C. A. 5th, 1954).

Respectfully submitted,

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